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Supreme Court, U.S.
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No. 94 1435

In The

Supreme Court of the United States

October Term, 1994

VIVIAN JOHNSON, M.D.,
Petitioner,

v.

HILLS & DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, KEN JENSEN, RHONDA HUME, THERON MIDDAUGH, CRAIG BELLEW, TOM OESCH, JOANN BROWN AND CINDY KLAUS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

AND APPENDICES

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QUESTIONS PRESENTED

I

WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE INTRA-CORPORATE CONSPIRACY DOCTRINE IS APPLICABLE TO CLAIMS ASSERTED UNDER 42 U.S.C. § 1983?

II

WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE SIXTH CIRCUIT CORRECTLY FOUND THAT THE INTRA-CORPORATE CONSPIRACY DOCTRINE APPLIES AS THE RESPONDENT/EMPLOYEES WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Vivian Johnson, M.D. and the Respondents Hills & Dales General Hospital, Theresa Deering, Dale Weidman, Doris Donahue, Ken Jensen, Rhonda Hume, Theron Middaugh, Craig Bellew and Tom Oesch.[1] Three individuals who were originally named as defendants, who are named as Respondents on plaintiff's Petition for Writ of Certiorari were dismissed from this lawsuit with prejudice pursuant to plaintiff's stipulation. These individuals are Myryka Weidman, Joann Brown, and Cindy Klaus.

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1 **There are no parent or subsidiary companies.**

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The order of the District Court for the Eastern District of Michigan granting summary disposition in favor of Respondents was entered on May 11, 1993. This order is attached as Appendix C to Petitioner's brief. The Sixth Circuit Court of Appeals upheld the district court's dismissal in an opinion and an order of judgment filed on November 16, 1994. The opinion and order of judgment entered by the Sixth Circuit Court of Appeals is attached as Appendix A and B to Petitioner's brief.

COUNTER-STATEMENT OF THE CASE

Respondents provide the following additional statement of the case as Petitioner's statement of the facts is

inaccurate, misleading and erroneous. In addition, Petitioner fails to cite to or attach as an Appendix any authority from the lower court record to support her statement of the facts.

For purposes of this Response to the Petition for Writ of Certiorari, Respondents rely upon the statement of facts as set forth in the Sixth Circuit Court of Appeals' decision (see Petitioner's Appendix A, p. 1a) which is supplemented, where necessary below.

District Court Judge Robert E. Cleland entered an order of summary judgment on May 6, 1993, dismissing Petitioner's five count complaint which alleged various civil rights violations. Petitioner on appeal challenged only the trial court's ruling and dismissal as to one count which alleged a violation of 42 U.S.C. § 1985(3). In granting summary judgment, the district court found the requisite conspiracy for a claim under 42 U.S.C. § 1985(3) could not be established by virtue of the so-called "intra-corporate conspiracy doctrine". The district court further rejected Petitioner's argument that an exception to the intra-corporate conspiracy rule existed because the individual defendants allegedly acted outside of the scope of their employment.

The Sixth Circuit Court of Appeals, in its November 16, 1994, opinion affirmed the district court's order of summary judgment. In so concluding, the Court of Appeals agreed with plaintiff and concluded that an exception to the rule that a corporation cannot conspire with itself exists "when the challenged activity takes place outside the course of employment." (See Petitioner's Appendix A, pp. 1a-2a.) However, the Court further found that, in this case, "the evidence does not establish that the employees' conduct meets that standard." *Id.*

As the Court of Appeals found, the plaintiff was employed at MasterCare Corporation which provided

hospitals with physicians to staff emergency room facilities (see Petitioner's Appendix A, p. 2a). Petitioner worked weekends at Hills & Dales General Hospital as an independent contractor intermittently between approximately October 1989 and April of 1990 (see Petitioner's Appendix A, p. 2a). At the request of the hospital, MasterCare ceased to schedule Petitioner at the hospital as of April 16, 1990 (see Appendix A, R. 79: Petitioner's Dep., p. 47, *infra* at A-1-A-2).

Rhonda Hume, Doris Donahue, Dale Weidman and Theron Middaugh addressed concerns they had regarding Petitioner in a memorandum to their immediate supervisors and to Ken Jensen, President of the Hospital (See Appendix B, R. 79: Employee Statement Regarding Dr. Johnson, *infra* at B-1-B-3). In that memo, it was specifically stated that the concerns of these employees were employment related:

> "As valued employees of Hills & Dales, our interests lie primarily in obtaining the best medical care for our patients. However, hospital reputation, cost containment and employee moral are also major concerns.
>
> Since there are serious doubts that Dr. Johnson amongst employees, administration and supervisors should consider trusting in the instincts of their hospital staff, and the misgivings concerning Dr. Johnson."

The President of the Hospital Ken Jensen testified that while he believed that Petitioner was a good physician, there was turmoil at the Hospital which adversely affected employee moral. He testified that this was the basis for his decision to request that MasterCare no longer schedule Petitioner at Hills & Dales General Hospital (see Appendix C, R. 79 and 97: Jensen Dep., pp. 40-42, 45, *infra* at C-1-C-4).

Petitioner has filed a Petition for Writ of Certiorari with this Court seeking review of the United States Court of Appeals for the Sixth Circuit's decision in this case. Respondents submit the following as their Response to the Petition.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE INTRA-CORPORATE CONSPIRACY DOCTRINE IS APPLICABLE TO CLAIMS ASSERTED UNDER 42 U.S.C. § 1983.

Summary judgment was properly granted dismissing the plaintiff's claims of a civil rights conspiracy because a corporation cannot conspire with itself and because employees of a corporation cannot, generally, be held liable for such an alleged conspiracy. Respondents submit that any alleged conflict among the circuits over the applicability of the intra-corporate conspiracy doctrine to 42 U.S.C. § 1985 claims does not merit review by this Court — first, because, as the Sixth Circuit concluded, the doctrine is applicable to § 1985 claims, and second, because the effects of the doctrine to § 1985 claims will affect a very small number of claimants.

The Sixth Circuit Court of Appeals has applied the general rule that a corporation cannot conspire with itself and that, thus, the intra-corporate conspiracy doctrine is applicable to claims asserted under 42 U.S.C. § 1983. See *Doherty* v. *American Motors Corp.*, 728 F.2d 334, 339 (6th Cir. 1984); *Hull* v. *Cuyahoga Valley Bd of Educ*, 926 F.2d 505, 509 (6th Cir. 1991), *cert. den.* 501 U.S. 1261 (1991). This doctrine, as adopted by the Courts in *Doherty* and *Hull*, was articulated by the Fifth Circuit in

Nelson Radio & Supply Co., Inc. v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. den.* 345 U.S. 925, 73 S. Ct. 783, 97 L. Ed. 1356 (1953), a case alleging anti-trust violations, as follows:

> "It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation."

In *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L. Ed. 2d 628 (1984), this Court affirmed the validity of the intra-corporate conspiracy doctrine under the Sherman Act stating "officers or employees of the same firm do not provide the plurality of actors imperative for a section one [15 U.S.C. § 1 conspiracy]." 81 L. Ed. 2d at 642.

In *Hull, supra*, the plaintiff alleged a conspiracy between a school district superintendent, the executive director of the district, and a school administrator, all of whom were employees or agents of the school board who the plaintiff alleged discriminated against her based on her race. 926 F.2d at 510. In *Hull*, the Sixth Circuit concluded that the conspiracy claim failed because there were "not two separate 'people' to form a conspiracy." *Hull*, at 510.

In *Doherty, supra*, the Sixth Circuit Court of Appeals found this doctrine was applicable in a case which alleged a conspiracy solely among agents, including legal counsel, of a corporation. 728 F.2d at 339.

The individual Respondents in this case include an administrator, supervisors, and employees of the hospital comprising a single legal entity, as in *Doherty* and *Hull, supra*. All actions which allegedly constituted the

conspiracy took place at Respondent hospital while the Respondents were engaged in the business of the hospital. Respondents constitute a single legal entity incapable of entering into a conspiracy. Petitioner failed to plead, and could not prove the requisite "two or more persons" necessary for a conspiracy. For this reason, Petitioner's conspiracy claims were properly dismissed as a matter of law and Respondents properly were granted summary judgment.

Several other circuit courts, as noted by the Sixth Circuit, have applied the intra-corporate conspiracy doctrine to civil rights conspiracy claims: *Herrmann* v. *Moore*, 576 F.2d 453 (2d Cir. 1978), *cert. den.* 439 U.S. 1003 (1978); *Girard* v. *94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70 (2d Cir. 1976), *cert. den.* 425 U.S. 974 (1976); *Baker* v. *Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974); *Dombrowski* v. *Dowling*, 459 F.2d 190, 196 (7th Cir. 1972); *Runs After* v. *United States*, 766 F.2d 347 (8th Cir. 1985); *Buschi* v. *Kerven*, 775 F.2d 1240 (4th Cir. 1985); *Garza* v. *City of Omaha*, 814 F.2d 553 (8th Cir. 1987); *Zombro* v. *Baltimore City Police Department*, 868 F.2d 1364, 1371 (4th Cir. 1989), *cert. den.* 493 U.S. 850 (1989); *Robison* v. *Canterbury Village, Inc.*, 848 F.2d 424 (3rd Cir. 1988).[2] In all of these decisions, the Court of Appeals for each of these circuits has applied the intra-corporate conspiracy doctrine to civil rights allegations under 42 U.S.C. § 1985.

In *Herrmann*, the Second Circuit Court of Appeals applied this doctrine to a claim by the plaintiff therein that his discharge as a tenured facility member of the defendant educational institution was the result of a

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[2] **This principle has been applied in cases other than claims under § 1985. See *Davis & Cox* v. *Summa Corp.*, 751 F.2d 1507, 1526 (9th Cir. 1985); *Marmott* v. *Maryland Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir. 1986), *cert. den.* 482 U.S. 929 (1987).**

conspiracy directed at him by the school, its trustees and certain of its faculty. The Second Circuit Court affirmed the dismissal of the § 1985 action stating:

> "Every one of the defendants who was involved in the so-called conspiracy was either a trustee or faculty member of the Brooklyn Law School — which is admittedly an educational corporation — and was acting in that capacity in connection with the discharge."
>
> * * *
>
> "Inasmuch as in the case at bar the complained-of injury was the discharge of plaintiff by the corporation, and inasmuch as each of the persons shown to have any purpose to further the discharge was the trustee or employee of the corporation and acting for it, we agree with the District Judge's conclusion that with respect to plaintiff's claim based on 42 U.S.C. § 1985(2) defendants were entitled to summary judgment." 576 F.2d at 459.

In *Buschi, supra*, the Fourth Circuit Court of Appeals further stated that the immunity granted under the intra-corporate conspiracy doctrine is not destroyed because agents are sued individually, stating:

> "Simply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation. The plaintiffs must also allege that they acted other than in the normal course of their corporate duties." 775 F.2d at 1252, quoting *Kole* v. *University of Hartford*, 391 F. Supp. 888, 893 (D.Conn. 1975).

Other circuits which have addressed the issue have also found, as the Sixth Circuit Court of Appeals found

in this case, that an exception to this doctrine exists when the challenge activity takes place outside the course of employment. See *Buschi*, *supra*, at 1252; *Garza*, *supra*, 556; *Girard*, *supra*, at 71.

As Petitioner notes in her petition, some circuits have held that the intra-corporate conspiracy doctrine is inapplicable. See *Novotny* v. *Great Am Federal Sav. & L. Ass'n*, 584 F.2d 1221, 1256 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 336 (1979); *Stathos* v. *Bowden*, 728 F.2d 15, 20 (1st Cir. 1984).

Respondents respectfully submit that such cases were incorrectly decided and that, contrary to petitioner's assertions and these circuit courts' conclusions, the intra-conspiracy doctrine was properly applied in this case.

The basic premise of the law governing corporations is that a corporation must act through its agents and employees. Since the acts of the agents are the acts of the corporation, the corporation cannot conspire with itself. If this were not the rule, acts by two or more employees and/or agents of a corporation would always amount to a conspiracy.

Even the Third Circuit in a decision subsequent to the *Novotny*, *supra*, case have applied the intra-corporate conspiracy doctrine to § 1985 claims. In *Robison*, *supra*, the Third Circuit Court of Appeals noted that, in its opinion, it only held in *Novotny* that officers and directors of a corporation can conspire with each other for purposes of § 1985(3) and had "no occasion to evaluate the force of the proposition that a corporation cannot conspire with itself." 848 F.2d at 431. The Court went on to state the proposition adopted (by what respondents believe is the majority of jurisdictions) that a conspiracy cannot arise between a corporation and its officers. In addition, the *Robison* Court noted the excep-

tion adopted by the Sixth Circuit in this case, that a conspiracy claim under § 1985(3) can be maintained "if the officer is acting in a personal, as opposed to official, capacity, or if independent third parties are alleged to have joined the conspiracy." *Id.* After stating these propositions, the Third Circuit affirmed the district court's order of dismissal, noting that the plaintiff had made no allegation of any conspiracy beyond that of the corporate officer conspiring with the corporation in his corporate capacity. *Id.*

Application of the intra-corporate conspiracy doctrine will not eliminate a claimant with a valid cause of action from alternative remedies. Section 1985(3) provides no substantive rights in itself, but rather is a purely remedial statute providing a cause of action when a defined federal right — namely, the equal protection of the laws or its privileges and immunities under the laws — is breached by a conspiracy. Among the remedies that may exist for a claim of racial discrimination, in addition to remedies under state laws and state constitutions, are those contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, as well as under other general civil rights statutes such as 42 U.S.C. §§ 1981 and 1986. In fact, the Petitioner in this case did initially allege civil rights violations under 42 U.S.C. §§ 1981 and 1986.

Further, respondents respectfully submit that this issue is not one to resolve the conflict between the circuits. The issue as presented to the Court in this case is not one which will affect very many potential claimants. Further, as set forth in Argument II, the facts in this case clearly establish that there was no discrimination against Petitioner on the basis of her race.

Respondents respectfully submit that the Sixth Circuit correctly applied the intra-corporate conspiracy doc-

trine to plaintiff's claims under 42 U.S.C. § 1983(3) and that this rule, which Respondents believe is the majority view, is the proper reasoned approach to conspiracy claims under 42 U.S.C. § 1985(3).

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE SIXTH CIRCUIT CORRECTLY FOUND THAT THE INTRA-CORPORATE CONSPIRACY DOCTRINE APPLIES AS THE RESPONDENT/EMPLOYEES WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT.

Even if an exception to the intra-corporate conspiracy doctrine exists when the challenged activity takes place outside the course of employment, there was no evidence, as the Sixth Circuit Court of Appeals found, to establish that the employees' alleged conduct here met that standard. The district court and the Court of Appeals properly found that there was no genuine issue of material fact and that the Respondents acted at all times in their capacity as employees of Hills & Dales General Hospital. Thus, as the lower courts found, the Respondents constituted a single legal entity incapable of entering into a conspiracy.

In order to prevent summary judgment, the non-moving party must proffer evidence that is admissible. Affidavits supporting or opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986). Applying this standard, it is evident that Petitioner failed to meet her burden and that the motion for summary judgment was properly granted.

In undisputed testimony, all Respondents who were deposed stated that they took their actions following the chain of command. Furthermore, there was testimony by Respondents that the reason for taking their concerns to management was the hospital. Specifically, Rhonda Hume testified that she was concerned about the layoffs occurring at the hospital, and the fact that costs from Dr. Johnson's excessive testing and demeanor could affect the financial status of the hospital and have to be absorbed by the hospital (see Appendix D, R. 98: Rhonda Hume Dep., p. 28, *infra* at D-1–D-2).

There was, moreover, no admissible *evidence* from any source that Petitioner's race played any role in this matter. *By Petitioner's own admission, other similarly-situated black physicians who worked at the hospital were not treated any differently because they were black.* At her deposition, Petitioner testified that the other black MasterCare physicians did not experience similar problems with the individual Respondents (see Appendix A, R. 79, Petitioner's Dep. pp. 140-141, *infra* at A-2–A-3). Petitioner admitted at her deposition that she was unaware of any prior problems with other black physicians and that she was aware that other black physicians had worked at the hospital through MasterCare without similar incidents or employee problems (see Appendix A, R. 79: Petitioner's Dep., pp. 140-141, *infra* at A-2–A-3).

All of the "facts" which Petitioner claims establish race discrimination or a discriminatory motive were based on conclusory assertions without evidentiary support or upon inadmissible hearsay characterizations by Petitioner which were not only uncorroborated but affirmatively contradicted by those to whom she attributed such statements, through deposition or affidavit.

For example, Petitioner testified that MasterCare representative, Lora Jones, informed Petitioner that she

was no longer being scheduled at Hills & Dales General Hospital at the hospital's request because she was black. However, Ms. Jones denied this inadmissible hearsay assertion, and testified that Mr. Jensen requested that Petitioner be removed from the schedule, *but that he never stated or intimated that the reason was because Plaintiff was black or female*:

> "Q. At any time, did Mr. Jensen tell you that he didn't want Dr. Johnson scheduled at the facility because she was an African American or because she was black?
>
> A. No.
>
> Q. Did he ever tell you that he didn't want her scheduled at the facility because she was a female?
>
> A. No.
>
> Q. Did he ever combine the two and say that she was black female, that was the reason he didn't want her?
>
> A. No."
>
> * * *
>
> "Q. Okay did he at any time ever tell you that there were some personality problems between Dr. Johnson and any of his staff?
>
> A. No."
>
> (See Appendix E, R. 79: Lora Jones Dep. p. 19, *infra* at E-1–E-2).

Ms. Jones further testified that Petitioner's quality of care was never questioned *and that the hospital's request had no effect upon MasterCare's continuing contractual relationship with the Petitioner.* (See Appendix E, R. 79: Lora Jones Dep. pp. 40, 42 & 45, *infra* at E-2–E-3).

Mr. Jensen confirmed that although he believed that Petitioner was a good physician, there was turmoil at the hospital which adversely affected employee moral, and this was the basis for his decision to request that MasterCare no longer schedule Petitioner at Hills & Dales General Hospital (See Appendix C, R. 79 and R. 97: Jensen Dep., pp. 40-42, 45, *infra* at C-1-C-4).

Also irrelevant (and less than entirely candid), is Petitioner's reliance upon deposition testimony by Rhonda Hume in which she indicated that as a young adult she might have used a racial slur to refer to a black person. Ms. Hume vigorously declared that she never used any racially derogatory terms regarding Dr. Johnson, that she harbors no animus for Dr. Johnson because she was black, and that while Ms. Hume might have told a racially derogatory joke as a 14 year old or younger, she has not used a racially derogatory term in the last ten years (See Appendix D, R. 98: Hume Dep., pp. 43, 46-47, *infra* at D-2-D-4).

The record further fully supported the conclusion by both the district court and the Court of Appeals that all of the comments or incidents assailed by Petitioner occurred while the individual Respondents were acting within the scope of their employment. As the Sixth Circuit Court of Appeals concluded, it is clear that any comments of the individual Respondents were connected to the legitimate business of Hills & Dales General Hospital and the work of its staff. Thus, since the Petitioner failed to establish that the individual Respondents acted outside the course of their employment, the intra-corporate conspiracy rule was correctly applied and summary judgment was properly granted.

CONCLUSION AND RELIEF REQUESTED

Respondents Hills & Dales General Hospital, Theresa Deering, Dale Weidman, Doris Donahue, Ken Jensen, Rhonda Hume, Theron Middaugh, Craig Bellew and Tom Oesch submit that the trial court properly granted, and the Court of Appeals properly affirmed their motion for summary judgment. Both courts properly found that the intra-conspiracy doctrine applies to this cause of action and that plaintiff could not prove the requisite element of such doctrine. Further, the Court of Appeals properly found that the individual Respondents were acting within the scope of their employment and that, therefore, the intra-corporate conspiracy rule applies.

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied because the lower court decisions were proper on the merits.

WHEREFORE, Respondents, Hills & Dales General Hospital, Theresa Deering, Dale Weidman, Doris Donahue, Ken Jensen, Rhonda Hume, Theron Middaugh, Craig Bellew and Tom Oesch respectfully request that this Honorable Court deny the Petition for Writ of Certiorari and grant costs and attorney fees to these respondents.

Respectfully submitted,

By: /s/ LINDA M. GARBARINO
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DATED: March 15, 1995

APPENDICES TO BRIEF FOR RESPONDENTS

• • •

APPENDIX A

EXCERPTS FROM PETITIONER'S DEPOSITION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Deposition of October 8, 1991)

(VIVIAN JOHNSON, M.D., Plaintiff, -vs- HILLS AND DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, JON FAHRNER, KEN JENSEN, MIKE WIDELY, TOM ESCH [*sic*], JOANNE BROWN and CINDY KLAUS, jointly and severally, Defendants — Civil Action No. 91 CV 73601 DT)

* * *

(47) * * * Q. He was through Master Care?

A. Yes.

Q. Do you have a copy of that document?

A. I believe I might be able to retrieve it. I'm not sure.

Q. What about for April, did you work all the weekends that you were scheduled on this schedule?

A. All the weekends that I was allowed.

Q. When was the last date that you worked at Hills and Dales?

Q. I was terminated on the 15th so it would be the morning of the 16th.

Q. You did work the morning of the 16th, is that what you are saying?

A. Yes, that was the last day that I worked there, although I was scheduled for the 27th, the weekend of

the 27th and I was also scheduled as you have here for the three weekends, one, two, three, in —

Q. May?

A. Uh huh, but I was terminated prior to that.

* * *

[(139) * * * Q. . . .] (140) is the factual underpinnings of that claim that you think that the other people, all of the individual defendants were doing the things that you've claimed that they've done to you because you are black.

A. Yes.

Q. How is it that you've come to that conclusion?

A. Because I was asking nursing staff if other physicians who had worked the emergency room got that kind of treatment or response from the hospital personnel that worked in the area.

Q. And they said no?

A. Yes.

Q. Are you aware if there were ever any other black physicians that worked there?

A. Yes.

Q. And did that other black physician —

MR. POSNER: That assumes a fact not in evidence. The question is whether she is aware whether there were any other blacks. That can be yes or no that there were or were not.

MS. BERKERY: What do you mean?

MR. POSNER: When you say are you aware whether there are any other blacks and the (141) answer is yes, that might mean there were no other blacks and I know that or it might mean that there were other blacks and I know that.

BY MS. BERKERY:

Q. Were you aware that there were other black physicians who worked at Master Care, worked through Master Care at Hills and Dales?

A. Yes, I was aware of that.

Q. Who were they, do you know their names?

A. Yes, I know one or two.

Q. What were their names?

A. Dr. Kimbro.

Q. Kimbro?

A. Uh huh.

Q. And what was the other person's name?

A. Dr. Smith.

Q. Did nursing staff tell you that these other black physicians had the same sorts of problems with these individual defendants?

A. No, they didn't.

* * *

APPENDIX B

EMPLOYEE MEMO

MEMO: Employee problems with Dr. Johnson, E.R. physician

TO: Mr. Curtis Landrith, R.N., Director of Nursing
Mr. Ken Jensen, President
Mr. Jon Fahrner M.T. (AMT), Laboratory Supervisor

There have been many problems concerning Dr. Johnson amongst hospital employees. Some of the laboratory concerns are listed below.

1. Orders excessive or seemingly inappropriate tests.
   A. Has standing blanket orders on adults and children and repeats these same series of tests on nearly every patient.
      1. *adult patients:* electrolytes, calcium, BUN, US, creatinine, glucose, LDH, CK, CKMB, CBC and blood cultures — ordered even on non-febrile patients
      2. *children:* Electrolytes, calcuim, BUN, UA, glucose, CBC, blood cultures — ordered even on non-febrile patients.
   B. Orders repeat testing of same lab tests previously done, even when initial tests were normal.
      i.e. infant Lillian Boyce
      i.e. repeat normal drug levels (sent out special) on an overdose patient.
2. Has expressed disbelief of laboratory results and has questioned the professionalism and knowledge of laboratory employees and other staff in front of other employees.

3. Has demonstrated distaste for hospital and medical staff policies. i.e.: cardiac profile sequence; does not agree with the times drawn or the tests included.

4. Has adversely affected the employee morale of the lab employees and of other departments.

5. Has shown a lack of professionalism by verbally defaming and ridiculing hospital employees and some of the medical staff, in their absence, to other hospital employees.

6. It has been stated by some hospital employees that Dr. Johnson has based some of her orders upon who is working in the department to be utilized, and depending upon her dislike for the employee working. i.e.: extra or late x-rays or lab tests.

6. [*sic*] There has also been extensive rumors of inappropriate writing and filling of prescriptions, the preferential treatment of patients having certain types of insurance or of a certain economic status, and the cohabitation of Dr. Johnson and her boyfriend while she was on duty and in the employ of Hills and Dales General.

There definitely appears to be a problem with Dr. Johnson's affiliation with Hills and Dales and the hospital employees. Before it is determined that there is "no trouble", additional employees should be interviewed. The ill-feelings between Dr. Johnson and many hospital employees cannot all be attributed to "personality conflicts".

As valued employees of Hills and Dales, our interests lie primarily in obtaining the best medical care for our patients. However, hospital reputation, cost containment and employee morale are also major concerns.

Since there are serious doubts about Dr. Johnson amongst employees, administration and supervisors

should consider trusting in the instincts of their hospital staff, and the misgivings concerning Dr. Johnson.

Hills and Dales is "our" hospital in "our" community. We, as employees, have a vested interest in the continued success of Hills and Dales, seven days a week, not just on occasional weekends.

Respectfully submitted,

/s/ Ronda K. Hume MT (ASCP) BS
Doris Donahue MT AMT HEW
Dale Weidman MT (AMT) HEW
[*Illegible*], Lab Ass't

APPENDIX C

EXCERPTS FROM JENSEN DEPOSITION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Deposition of November 14, 1991)

(DR. VIVIAN JOHNSON, M.D., Plaintiff, vs HILLS AND DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, JOHN FAHRNER, KEN JENSEN, MIKE WIDELY, TOM ESCH [*sic*], JOANNE BROWN, and CINDY KLAUS, jointly and severally, Defendants — FILE NO. 91 CV 73601 DT; HON. BERNARD A. FRIEDMAN)

* * *

(40) * * * Q. Do you recall speaking with anybody besides Fahrner and Landrith following the memo from Hume?

A. Not that I recollect right this minute.

Q. Okay. That basically concluded your investigation?

A. Uh-huh (affirmative).

Q. You have to say "yes."

A. Yes.

Q. At the conclusion of your investigation did you believe the allegations in the memo, Exhibit 2?

A. It didn't really matter whether I believed the allocations [*sic*] or not. I obviously had turmoil going within the hospital in separate departments, and I couldn't tolerate that.

Q. You decided, whether or not the allegations were true, you were not going to tolerate the turmoil; is that fair?

A. True.

Q. Understanding that, and I realize it may not have been important to you to your decision making, I would

like to know whether or not you believed any of the allegations, some of them or all of them at the conclusion of your investigation.

MS. BERKERY: Or whether you even made a decision whether you believed them or not.

(41) (Witness reviews document)

A. Well, I guess there's an item or two here that I could believe, yeah.

Q. What would be the items that you could believe as of —

A. Has adversely —

Q. — as of that time?

A. Pardon me?

Q. What would be the items that you could believe as of that time?

A. Has adversely affected my employee morale.

Q. Anything else?

A. That's enough.

Q. Okay. You indicated there was turmoil. What do you mean by that? What was going on?

A. The x-ray people were very upset. The lab people were very upset. Nursing was very pleased and happy. Everything was fine with them. We had these people going at each other, and there was — it was a significant problem.

Q. When you say, "We had these people going at each other," what do you mean by that?

A. Well, you had the two — at least two departments were having problems with Dr. Johnson, for whatever reason, and nursing was not. Nursing was aware the situation had been brought to my attention, and they made sure they communicated their feelings to me also. So that was the (42) dilemma I had.

Q. With respect to the portions of the memo that referred to the writers' opinions regarding testing and

whether or not it was excessive or inappropriate, what did you make of that, if anything?

A. I didn't even consider those kinds of things. Those are medical staff issues. I didn't really have a problem with those things.

Q. You felt that it really wasn't within the qualifications of the lab people to comment on that; —

MS. BERKERY: Objection. Foundation.

Q. — is that fair?

MS. BERKERY: If you want to ask him a question, I mean, that he can answer — I mean, you're trying to put words in his mouth. I mean —

Q. Well, did you feel that they were qualified to —

A. I didn't consider the —

MS. BERKERY: Asked and answered.

A. — comments. I didn't consider the comments because they were medical staff matters.

* * *

(45) * * * Q. Who made that decision?

A. I did.

Q. Did anybody participate with you in that decision?

A. No.

Q. And what was your reason for — or reasons for the termination?

MS. BERKERY: You mean removing her from the schedule?

MR. POSNER: Yes.

A. Removing her from the schedule?

Q. Sure.

A. Because of the unrest of the staff adversely affecting the morale within the hospital. I had a real problem brewing. That was a sufficient reason.

Q. Let me ask you this: Other than the presentation of this memo, how did the unrest of the staff manifest itself? In other words, what was going on?

A. Well, they were just very irritated. They were frustrated. And I guess that pretty well covers it. They were irritated and frustrated and —

Q. And this is what you were told?

A. That's right. Well, and I could — I could certainly observe that in a couple of cases.

* * *

APPENDIX D

EXCERPTS FROM HUME DEPOSITION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Deposition of November 14, 1991)

(DR. VIVIAN JOHNSON, M.D., Plaintiff, vs HILLS AND DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, JOHN FAHRNER, KEN JENSEN, MIKE WIDELY, TOM ESCH [*sic*], JOANNE BROWN, and CINDY KLAUS, jointly and severally, Defendants — FILE NO. 91 CV 73601 DT; HON. BERNARD A. FRIEDMAN)

* * *

(28) * * * Q. Why would you take it upon yourself to raise this issue, as a lab tech, concerning doctors?

A. Why would I? I think part of it might be — this is all I can think of right now — that we are laying off people, we're trying to cut costs, and I don't see the point in doing inappropriate tests that the hospital might have to absorb the cost of. And that's the only explanation I can think of right now.

Q. Has the administration in the past had any discussions with you — not you alone, but with you and your department — about cost consciousness for the hospital?

A. It's been brought up. I don't recall where, but — oh, yeah, now I do recall wh-- — just recently in fact Mr. Jensen brought up that we're tying to keep costs down, and if you have any ideas to save money, let him know.

Q. That was after Dr. Johnson's —

A. Yes, it was.

Q. — relationship here? Okay. In the past when you've mentioned this subject of possibly excessive or inappropriate tests to your supervisors, what kind of feedback have you gotten from them?

A. I do not — I don't remember what he said. . . .

* * *

(43) * * * Q. Have you heard negative comments about — let's say, about people on welfare in Detroit —

MS. BERKERY: Same objection.

Q. — here at the hospital?

A. I've heard negative comments about people on welfare, but they don't necessarily have to obtain [*sic*] to the people in Detroit.

Q. Okay. Or have you heard negative comments about the blacks in Detroit?

A. Well, not with whom I was speaking with.

Q. Have you heard any of your coemployees ever use a racial slur to refer to a black person?

A. No.

Q. Have you ever used, in your adult life, a racial slur to refer to a black person.

A. I'm sure I have as a younger adult.

Q. Okay. I may have asked you this. If I did, I apologize. I think you said this is the first time you ever prepared a memo about a physician at the hospital; is that fair?

A. That's correct.

* * *

(46) * * * Q. And in that respect, completely apart from the question of medical training, the ER physician would be in a better position to determine what lab tests are appropriate than you, wouldn't he or she?

A. Yes, that's true.

MR. POSNER: I don't have anything else.

MS. BERKERY: I have a couple of questions to clear up.

EXAMINATION BY MS. BERKERY:

Q. Ms. Hume, as you know, my name is Karen Berkery. I represent the hospital in this matter. Have you ever used any racially derogatory words concerning Dr. Johnson?

A. No, I haven't.

Q. Do you harbor any dislike for Dr. Johnson because she's black?

A. No, I did not.

Q. Did you harbor any dislike for Dr. Johnson because she was a woman?

A. Oh, absolutely not.

Q. What about because she was a black woman?

A. No.

Q. Okay. Did you write this memo that we've been talking (47) about — I forget what exhibit number it is —

A. 2.

Q. — 2 — because Dr. Johnson was a black female?

A. No.

Q. I think earlier you may have answered a question where you indicated that you may have used a racially derogatory term in your young adulthood or something. Would you say that's been any time since your early teens?

MR. POSNER: Well, I think you're leading the witness. I think the question related to her adult life, and she answered that she did.

A. Well, I consider adult life puberty on. And I'm sure as a 14 year old I might have told an off colored joke or something when I was younger and not as — quite as experienced, I guess.

Q. All right. What about in the last ten years? Why don't we put it that way.

A. Last ten years, no.

MS. BERKERY: Okay. I have nothing further.

MR. POSNER: Nothing else.

APPENDIX E

EXCERPTS FROM JONES DEPOSITION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Deposition of February 11, 1992)

(VIVIAN JOHNSON, M.D., Plaintiff, vs. HILLS & DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, RONDA HUME, THERON MIDDAUGH, CRAIG BELLEW, KEN JENSEN, TOM OESCH, JOANNE BROWN and CINDY KLAUS, Defendants — Case No. 91 CV 73601 DT; HON. BERNARD A. FRIEDMAN)

* * *

(19) * * * Q. At any time, did Mr. Jensen tell you that he didn't want Dr. Johnson scheduled at the facility because she was an African-American or because she's black?

A. No.

Q. Did he ever tell you that he didn't want her scheduled at the facility because she was a female?

A. No.

Q. Did he ever combine the two and say that she was a black female, that was the reason he didn't want her?

A. No.

Q. Okay. Did he go into anything further with you regarding these petitions? Did he describe what they were about?

A. No.

Q. Okay. Did he, at any time, ever tell you that there was some personality problems between Dr. Johnson and any of his staff?

A. No.

Q. Okay. After Dr. Johnson was no longer being scheduled — well, strike that.

After you spoke to Mr. Jensen, did you then not schedule Dr. Johnson at Hills and Dales anymore?

A. That's correct.

* * *

(40) * * * Q. Okay. Well, you indicated that the reason that MasterCare went out of business, so far as you were aware, was medical liability insurance costs.

A. One of the major factors, yes.

Q. I assume, before MasterCare closed its doors, you were made aware of the fact that medical liability costs were a problem for the business.

A. Yes.

Q. Okay. And therefore, MasterCare would have some concern about scheduling physicians if MasterCare had some reason to believe that the physician would not be offering quality care, is that fair?

A. Can you repeat that again?

Q. Sure. In other words, would MasterCare have some concerns about scheduling a physician at a hospital if MasterCare had some reason to believe that the physician wasn't offering quality care?

A. That's correct.

Q. Okay. And so if a hospital administrator informed MasterCare that they didn't want a particular physician scheduled anymore, would that raise in your mind the question of whether or not there might be a quality of care issue here that perhaps we ought to ask about?

A. A quality of care question?

* * *

(42) * * * Q. Okay. And he didn't lead you to believe that there was a quality of care issue?

A. No, he did not lead me to believe anything.

Q. Okay. Did it trouble you at all that there was a quality of care issue?

A. No, he did not lead me to believe anything.

Q. Okay. Did it trouble you at all that there was a doctor on your schedule who you would be sending or scheduling for various hospitals, and the hospital administrator of one of those hospitals says he does not want to get into reasons?

A. No.

Q. So you didn't take that issue up with Dr. Servis or Ms. Kelley to see if they might get back to the hospital and find out what's going on here?

A. I informed them of what their request was, and they basically just said, then abide by their request.

Q. So neither Dr. Servis nor Ms. Kelley asked you, what did Mr. Jensen mean by that? Or what his reasons were?

A. No, not that I can recall.

Q. Okay. When you spoke with Dr. Johnson to inform her that Hills and Dales no longer wanted her on the schedule, was that by telephone?

A. Yes.

* * *

(45) Q. All right. Now, you had scheduled Dr. Johnson over a period of several months at Oceana Hospital in Hart and at Lansing Occupational Medical Center, is that correct?

A. That's correct.

Q. And even after Mr. Jensen told you that he didn't want Dr. Johnson on the Hills and Dales schedule anymore, you had no fear of placing Dr. Johnson at other hospitals, is that correct?

A. That's correct.

Q. And, in fact, you had no other negative feedback from any other hospital regarding Dr. Johnson, is that correct?

A. That's correct.

* * *